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2014

# Public Access Ombudsman Annual Report 2014

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# **STATE OF MAINE OFFICE OF THE ATTORNEY GENERAL**

**Janet T. Mills, Attorney General**



**PUBLIC ACCESS OMBUDSMAN ANNUAL REPORT**

**2014**

**Brenda L. Kielty, Esq., Ombudsman**

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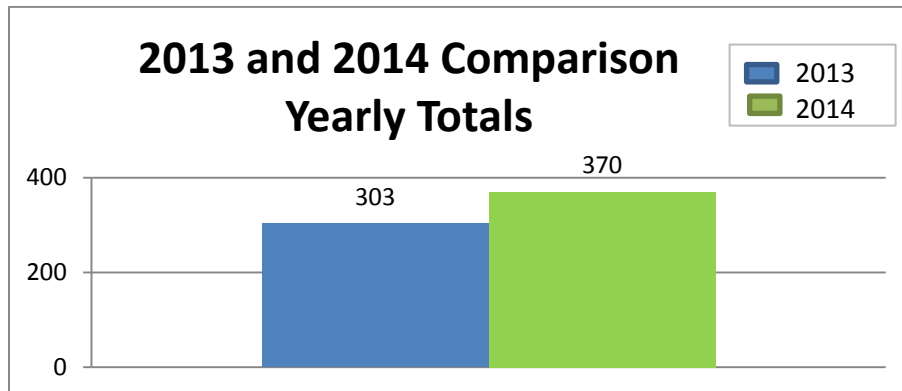
## SUMMARY

Maine's Freedom of Access Act (FOAA) recognizes that government must be accountable to the people and provides a statutory right of access to public meetings and public records. While the principles of open government, transparent deliberations and access to public information are fundamental to FOAA, these interests must be balanced with the need for government to maintain the confidentiality of information to protect personal privacy, security and other legitimate interests.

In 2007 the Legislature created the public access ombudsman position within the Office of the Attorney General. The statute authorized the ombudsman to educate the public and government officials about the requirements of the State's freedom of access law, provide dispute resolution services, answer inquiries and make recommendations for improvements to the law. In 2012 the Legislature funded a full-time ombudsman position.

The ombudsman performs an unusual role in government. Although the ombudsman receives complaints from the public, the ombudsman's job is not to be either an advocate for the complainant or a defender of the government. An ombudsman is an impartial intermediary who provides information, who informally resolves disputes and who determines whether an agency or a requester has acted in accordance with the law. The ombudsman encourages full compliance with the spirit and the letter of the law.

A total of 370 contacts were logged in 2014 from FOAA requesters and agencies seeking assistance, representing an increase of 67 contacts from 2013.



As was the case in 2013, the bulk of the contacts were telephone inquiries from private citizens regarding access to public records held by municipal government agencies.

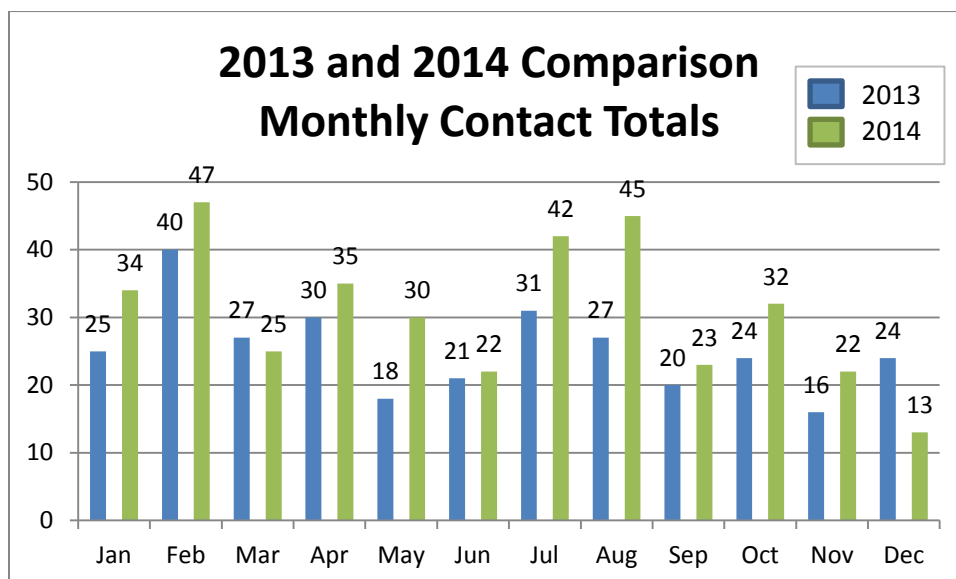
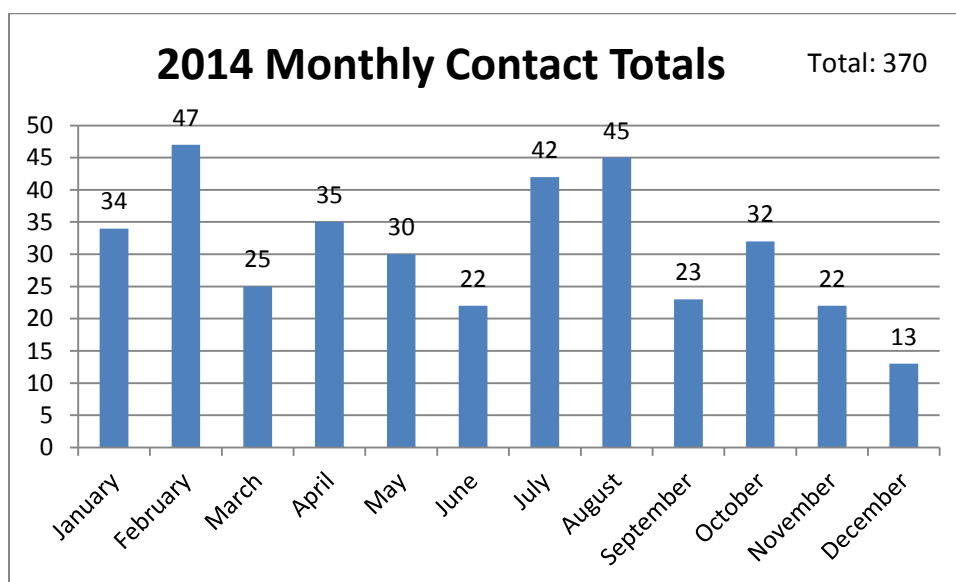
Brenda L. Kielty, Public Access Ombudsman

## ANSWERING INQUIRIES & RESOLVING DISPUTES

“The ombudsman shall respond to informal inquiries made by the public and public agencies and officials concerning the State’s freedom of access laws; and respond to and work to resolve complaints made by the public and public agencies and officials concerning the State’s freedom of access laws.” 5 M.R.S. § 200-I(2)(A) and (B).

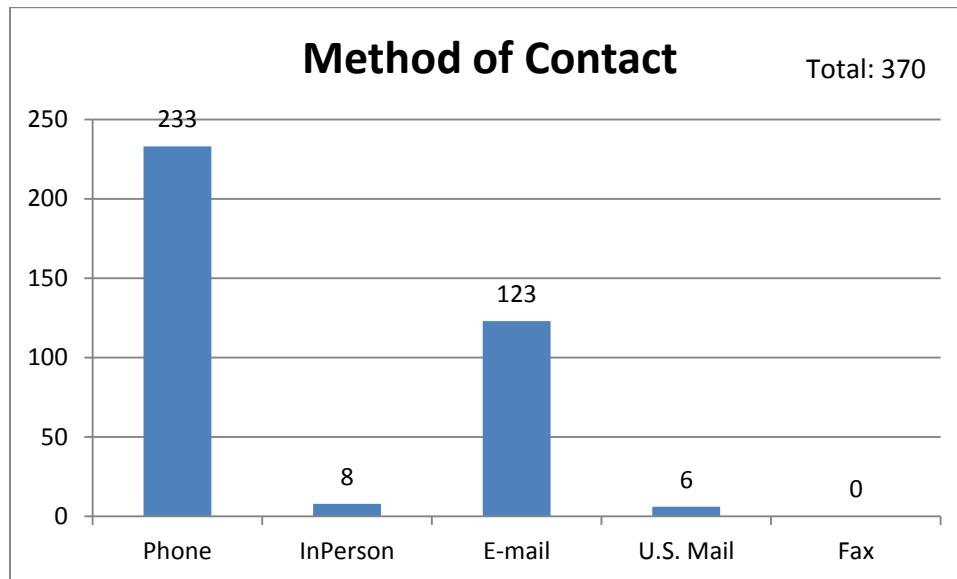
### 2014 Contacts with the Ombudsman

In 2014 the ombudsman logged 370 inquiries, complaints and suggestions. Requests for help ranged from questions about how to file a FOAA request to more difficult inquiries regarding situations in which the FOAA issues were only part of a larger dispute or where some fact-finding was necessary before appropriate advice could be given.



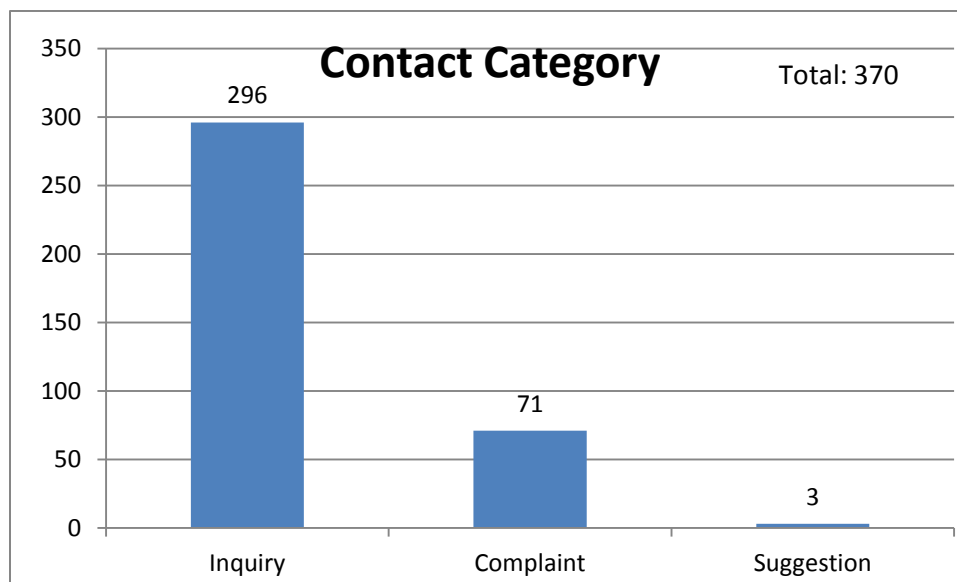
### Method of Contact

The bulk of initial contact was by telephone (233) followed by email (123), U.S. Mail (6) and in-person (8).



### Contacts Included Inquiries, Complaints and Suggestions

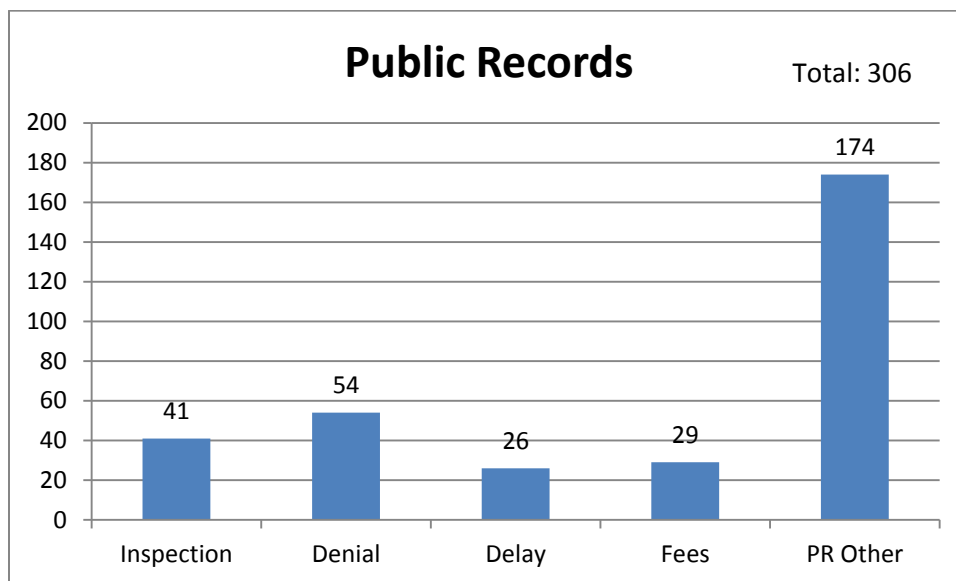
The 370 contacts included general inquiries (296), complaints (71) and suggestions (3). Contacts that were characterized as complaints involved a substantial controversy between the parties with specific relief or remedy sought by the complainant.



## Contacts Concerning Public Records

Of the contacts about public records (306), the most common questions concerned:

- Basis for a denial
- Inspection of electronic records
- Fees
- Reasonable response times and delay
- Confidentiality exceptions



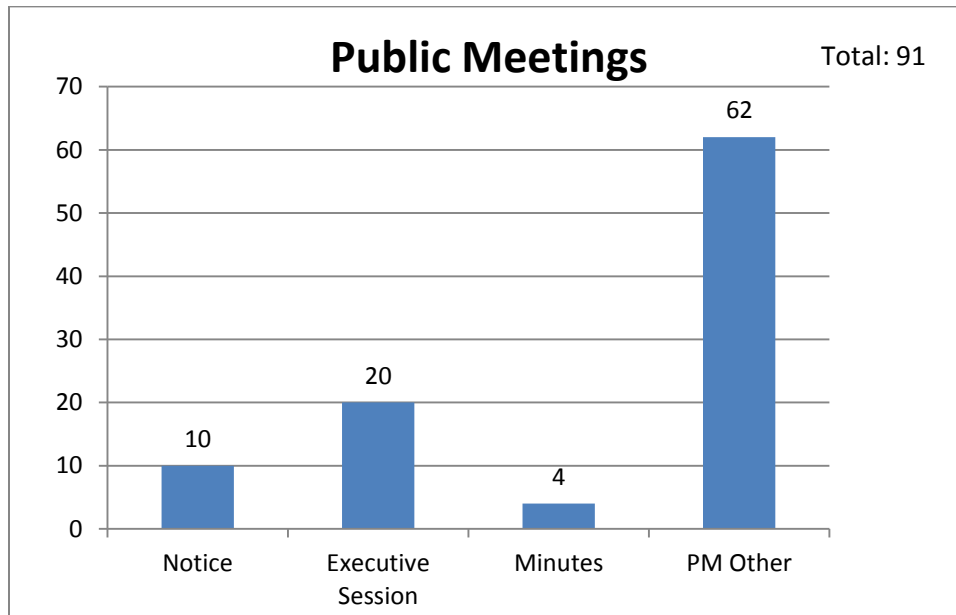
All other public records contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- Retention and destruction of records
- Confidentiality of specific documents prior to a FOAA request being made
- Access to records normally part of discovery
- General information on making a FOAA request
- Mandatory FOAA training for officials
- Whether an entity is subject to FOAA
- Asking for a document rather than asking for the answer to a question
- Legislation and case law
- Asking for an agency to compile data or create a document
- Abuse of FOAA by requesters
- Due diligence of an agency in searching for records

## Contacts Concerning Public Meetings

Of the contacts concerning public meetings (91), most questions concerned:

- Use of executive session
- Notice



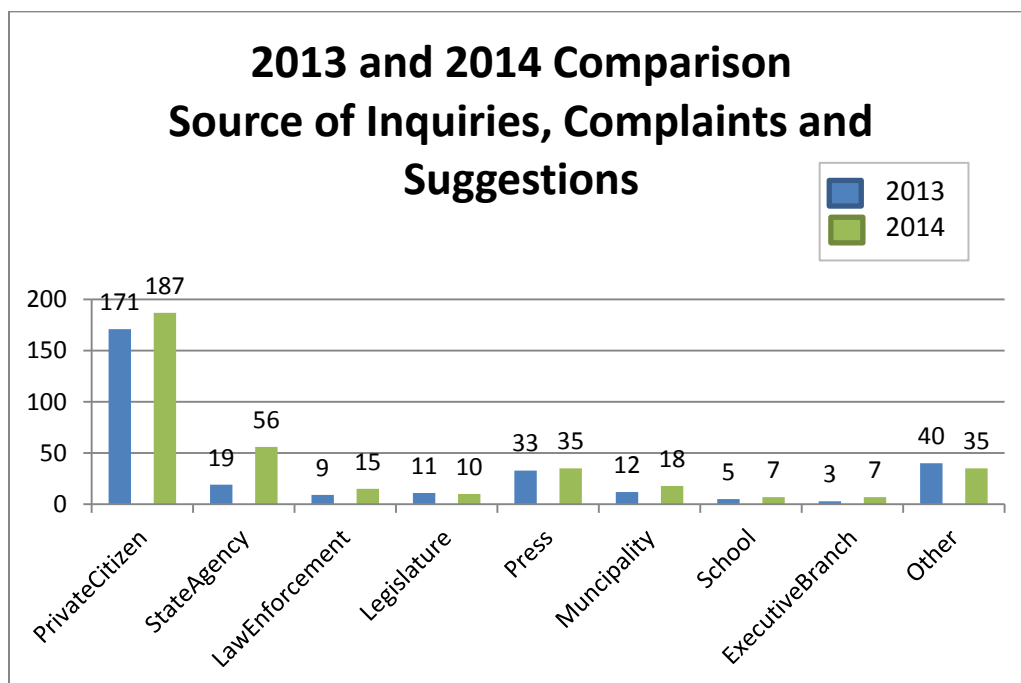
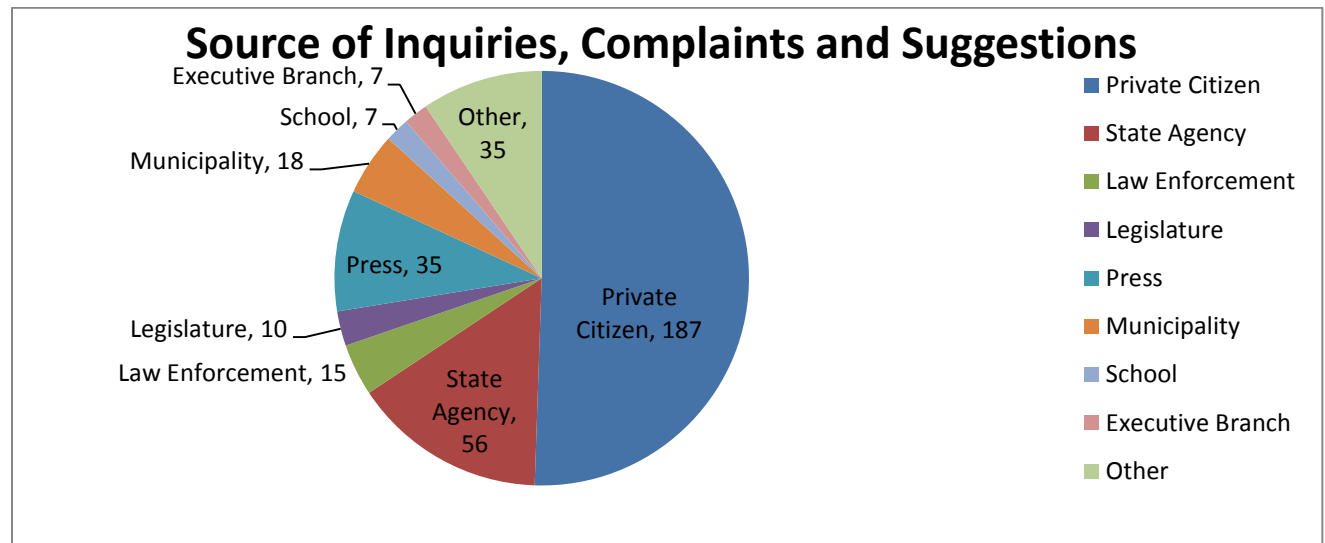
All other public meetings contacts concerned either a combination of issues or a narrow subset of the listed categories. The “Other” category includes the following kinds of questions:

- Online communication during public meetings
- Public comment period during public meetings
- Remote participation
- What entities are subject to FOAA
- What constitutes a meeting



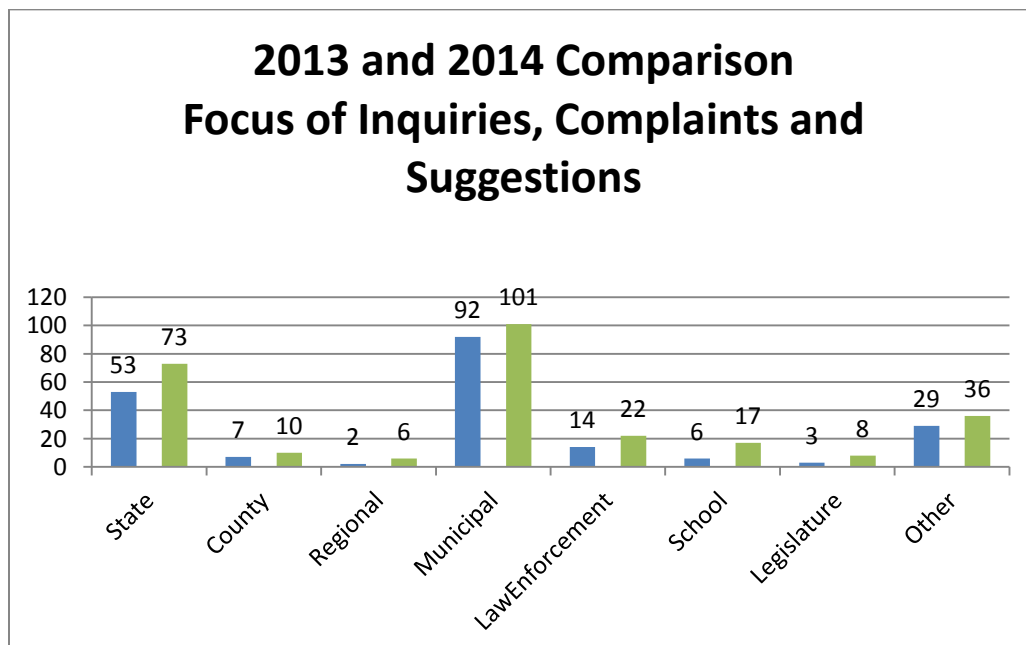
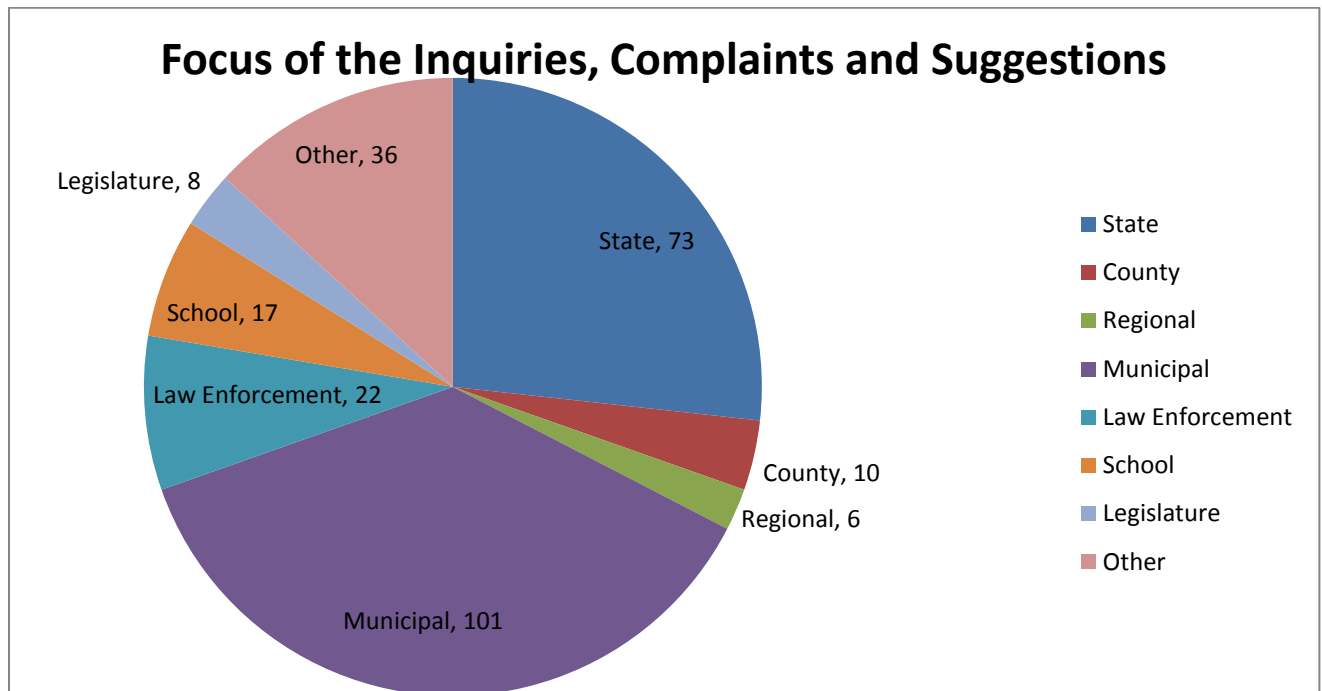
## Source of Inquiries, Complaints and Suggestions

Of the 370 inquiries, complaints and suggestions, 187 came from private citizens, 56 from state agencies, 15 from law enforcement agencies, 10 from the Legislature, 35 from members of the media, 18 from school districts, 7 from the executive branch and 35 from others including attorneys and commercial requesters.



### Focus of the Inquiries, Complaints and Suggestions

Most of the inquiries and complaints concerned municipalities (101) and state agencies (73). The remainder concerned law enforcement agencies (22), school administrative units (17), county agencies (10), the Legislature (8) and regional agencies (6). Others (36) concerned individual requesters, commercial requesters and various quasi-municipal and public entities.



### Outcomes Reached as Result of Contact with Ombudsman

A contact may be logged as “resolved” for the following reasons:

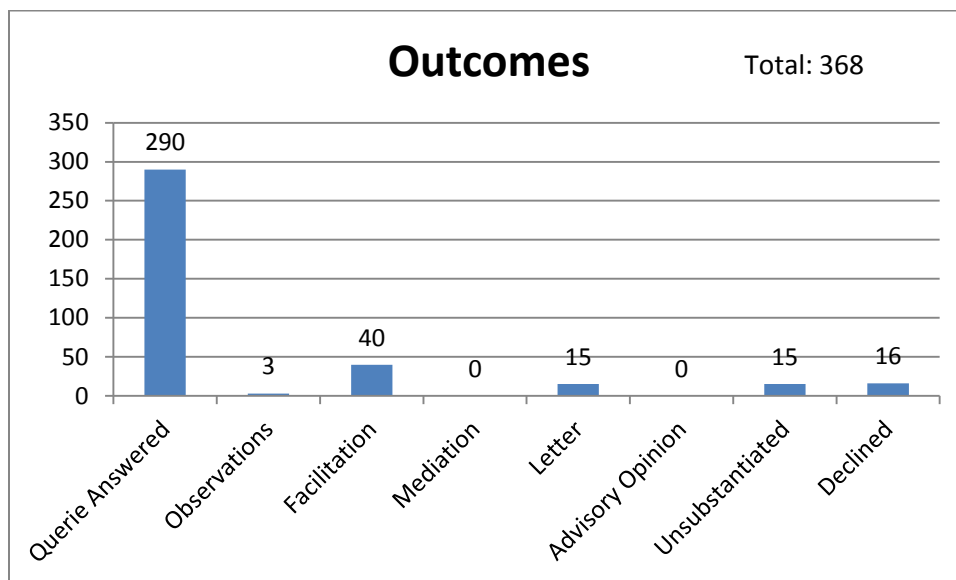
- Complaint was deemed unsubstantiated
- Informal discussions or facilitation resulted in an agreement on how to proceed
- Agency offered an acceptable remedy
- Complaint was withdrawn
- Complainant failed to produce requested information
- Ombudsman determined there was other good cause not to proceed

A contact may be logged as “declined” if the subject of the dispute was outside the scope of authority of the ombudsman or related to a matter that was the subject of an administrative or judicial proceeding. In 2014 a total of 16 cases were declined.

Many of the inquiries were answered either immediately or within a matter of days. The 370 contacts included 290 answers to inquiries, 3 suggestions from citizens for improvements to the law, 40 facilitated resolutions, and 15 letters addressing cases of substantial controversy.

The ombudsman did not issue any advisory opinions in 2014.

Two cases remained open at the end of 2014.



## OUTREACH & TRAINING

The ombudsman provided on-site FOAA trainings and presentations to a variety of state and local entities including the following:

- Maine 127<sup>th</sup> Legislature
- Maine Water Utilities Association
- University of Maine School of Law
- Maine Department of Health and Human Services
- York County Prosecutorial District No. One
- Consumer Matters Public Access Television Segment

The State FOAA website, [Your Right to Know: Maine's Freedom of Access Act](#) provides contact information for the ombudsman and links to a variety of resources including a Frequently Asked Questions page that serves as a self-administered training for public officials. The ombudsman updates and maintains the website to reflect changes in the law.

## RECOMMENDATIONS

The ombudsman is in a unique position to suggest improvements to the FOAA process and is mandated by statute to make recommendations concerning ways to improve public access to public records and proceedings.

### **Record Management and Retention**

After the Office of Program Evaluation and Government Accountability released its December 2013 report on Healthy Maine Partnerships' FY 13 Contracts and Funding, the Government Oversight Committee (GOC) considered potential actions regarding State-level record retention policies and practices. As a result of this review, GOC requested that a working group be convened to make recommendations for improvements to the State's record retention framework.

The ombudsman and the Director of the State Archives Records Management will present the findings and recommendations of the workgroup to GOC in March, 2015.

Confusing, unclear or inadequate retention policies and poor record management practices present a barrier to accessing public records. A request for a public record that should otherwise have been retained but that cannot be found will produce nothing. FOAA does not cure poor records practices and without significant effort to ensure proper records management, the access to public records provided by FOAA can be threatened.

Maintaining up-to-date record retention schedules and policies, providing appropriate training and establishing a system of accountability should be considered a prerequisite to agency FOAA compliance. Although the GOC review is limited to executive branch State agencies, many of the challenges to adequate record management and retention faced by those agencies are common to all levels of government. The actions or recommendations that result from the GOC review could provide useful guidance for local government agencies. Whether State or local, all government agencies should consider improvements to record management and retention in light of the impact on access to public records.

## APPENDIX

### 5 M.R.S.A. § 200-I

#### § 200-I. Public Access Division; Public Access Ombudsman

**1. Public Access Division; Public Access Ombudsman.** There is created within the Department of the Attorney General the Public Access Division to assist in compliance with the State's freedom of access laws, Title 1, chapter 13<sup>1</sup>. The Attorney General shall appoint the Public Access Ombudsman, referred to in this section as “the ombudsman,” to administer the division.

**2. Duties.** The ombudsman shall:

**A.** Prepare and make available interpretive and educational materials and programs concerning the State's freedom of access laws in cooperation with the Right To Know Advisory Committee established in Title 1, section 411;

**B.** Respond to informal inquiries made by the public and public agencies and officials concerning the State's freedom of access laws;

**C.** Respond to and work to resolve complaints made by the public and public agencies and officials concerning the State's freedom of access laws;

**D.** Furnish, upon request, advisory opinions regarding the interpretation of and compliance with the State's freedom of access laws to any person or public agency or official in an expeditious manner. The ombudsman may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Title 1, chapter 13. Advisory opinions must be publicly available after distribution to the requestor and the parties involved;

**E.** Make recommendations concerning ways to improve public access to public records and proceedings; and

**F.** Coordinate with the state agency public access officers the compilation of data through the development of a uniform log to facilitate record keeping and annual reporting of the number of requests for information, the average response time and the costs of processing requests.

**3. Assistance.** The ombudsman may request from any public agency or official such assistance, services and information as will enable the ombudsman to effectively carry out the responsibilities of this section.

**4. Confidentiality.** The ombudsman may access records that a public agency or official believes are confidential in order to make a recommendation concerning whether the public agency or official may release the records to the public. The ombudsman's recommendation is not binding on the public agency or official. The ombudsman shall maintain the confidentiality of records and information provided to the ombudsman by a public agency

or official under this subsection and shall return the records to the public agency or official when the ombudsman's review is complete.

**5. Report.** The ombudsman shall submit a report not later than March 15th of each year to the Legislature and the Right To Know Advisory Committee established in Title 1, section 411 concerning the activities of the ombudsman for the previous year. The report must include:

- A. The total number of inquiries and complaints received;
- B. The number of inquiries and complaints received respectively from the public, the media and public agencies or officials;
- C. The number of complaints received concerning respectively public records and public meetings;
- D. The number of complaints received concerning respectively:
  - (1) State agencies;
  - (2) County agencies;
  - (3) Regional agencies;
  - (4) Municipal agencies;
  - (5) School administrative units; and
  - (6) Other public entities;
- E. The number of inquiries and complaints that were resolved;
- F. The total number of written advisory opinions issued and pending; and
- G. Recommendations concerning ways to improve public access to public records and proceedings.

**6. Repealed.** Laws [2009, c. 240, § 7, eff. June 2, 2009.](#)

## Credits

[2007, c. 603, § 1; 2009, c. 240, § 7, eff. June 2, 2009; 2013, c. 229, §§ 1, 2, eff. Oct. 9, 2013.](#)

## Footnotes

1

[1 M.R.S.A. § 401 et seq.](#)

5 M. R. S. A. § 200-I, ME ST T. 5 § 200-I

Current with legislation through the 2013 Second Regular Session of the 126th Legislature.

The Second Regular Session convened January 8, 2014 and adjourned May 2, 2014. The general effective date is August 1, 2014.